

OPINION NO. 95-5

[48 Or. Op. Atty. Gen. 15]

No. 8238

December 12, 1995

The Honorable Cynthia Wooten State Representative

This opinion concerns legislative authority and oversight of specific operations of the Oregon State Lottery (Lottery).

#### FIRST QUESTION PRESENTED

Would the combined video lottery game terminals and racing activities authorized by Enrolled House Bill 3411 (1995) constitute a casino as prohibited by the Oregon Constitution?

#### ANSWER GIVEN

There is a high probability that a court, if presented with the question, would hold that HB 3411 violates Article XV, section 4(6), of the Oregon Constitution due to the concentration and operation of 75 video lottery terminals that would be permitted at a single racing facility.

#### SECOND QUESTION PRESENTED

May the Legislative Assembly restrict the compensation paid to Lottery game retailers by enacting a statute that limits the percentage of gross revenue, or the percentage of the retail price of a lottery ticket or game, that may be retained by a Lottery game retailer?

#### ANSWER GIVEN

The Legislative Assembly has authority to prescribe by statute the amount, percentage or structure of commissions or compensation paid to Lottery retail contractors, provided such an enactment does not unduly burden the Lottery Commission's (commission) constitutional duty to operate the Lottery. A legislative enactment increasing retail contractor compensation would be permissible unless the compensation were set so high as to absorb such a large proportion of the 16 percent of gross revenues allowed by the Oregon Constitution for the Lottery's administrative expenses that the Lottery had insufficient administrative funds to carry out its reasonably necessary duties and functions. Conversely, if the Legislative Assembly enacted legislation reducing retail contractor compensation, additional moneys would be available, either for Lottery "administrative expense" or for economic development or schools. Such an enactment would be permissible unless the prescribed rate of compensation were so low that it compromised the revenue-generating capacity of the

Lottery by causing a substantial reduction in the number of retailers who participate in Lottery sales.(fn1)

## DISCUSSION

### I. Constitutionality of House Bill 3411

#### A. Overview of Pertinent Provisions of House Bill 3411

Section 4(1) of HB 3411 would amend ORS chapter 461 to authorize the director of the Lottery to enter into video lottery retailer contracts with persons who hold Oregon Racing Commission race meet licenses and operate race courses in a county with a population of 400,000 or more. Only two racing establishments meet those criteria, Multnomah Greyhound Park and New Portland Meadows in Multnomah County.

Section 4(3) of the bill provides that if the director establishes such a contract, then the contractor may install up to 75 video lottery terminals in its facility:

Notwithstanding ORS 461.217,[(fn2)] if the director enters into a contract with a race meet licensee described in subsection (1) of this section, the race meet licensee may install, upon 10 percent of the enclosed floor space at the facility used by patrons, a number of video lottery game machines that does not exceed one machine for each 24 square feet of such enclosed floor space, in a total amount not to exceed 75 video lottery game machines per facility.

Thus, once a contract is established, the race track licensee is authorized to install the full complement of 75 video lottery game machines, subject only to the bill's floor space limits. The number of terminals at each location, up to the 75-terminal limit, is not subject to restriction or regulation by the director or the commission, unless the square footage of "the enclosed floor space at the

facility used by patrons" is insufficient to provide 24 square feet of enclosed floor space for each terminal.(fn3)

#### B. Constitutional Prohibition of Casinos

Article XV, section 4(6), of the Oregon Constitution states:

The Legislative Assembly has no power to authorize, and shall prohibit, casinos from operation in the State of Oregon.

In *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 871 P2d 106 (1994), the Oregon Supreme Court construed the constitutional prohibition of the operation of casinos in Oregon, concluding that in adopting the prohibition,

the voters intended to prohibit the operation of establishments whose dominant use or

dominant purpose, or both, is for gambling.

318 Or at 562.

The court's definition of a casino embraces traditional, Las Vegas-type casinos. In referring to the dominant use or purpose of an establishment as being "for gambling," the court's statement also literally encompasses race facilities that are operated for parimutuel wagering. Betting on racing animals undeniably is gambling. See *Mult. Co. Fair Ass'n v. Langley*, 140 Or 172, 179, 13 P2d 354 (1932). However, the court's formulation prescribes no precise or mathematical test for when an establishment crosses the line from a tavern, lounge or race track to a casino.

We find it hard to ignore, however, the two-pronged character of the court's test, which prohibits the operation of an establishment if either its "dominant use" or its "dominant purpose" is for gambling. Although a race track offers the entertainment afforded by the sport of racing, the most immediate association of a race track in the mind of the ordinary voter<sup>(fn4)</sup> is

with, and the primary source of revenue for a racetrack is from, betting on the racing animals. We feel it safe to conclude that a racetrack at its inception is established and licensed for the "purpose" of conducting gambling. The gambling at a race track is based on the performance of animals rather than on the outcome of what are regarded as casino-style games, and it involves betting against other patrons rather than against the "house." Nevertheless, a racetrack possesses many of the characteristic elements of a traditional casino. The conduct of wagering is the primary object of the enterprise. The beverage and food services, and other entertainment, are ancillary to the conduct of the gambling; they are aimed at attracting and providing for the comfort of the gamblers.

We recognize that race tracks probably were not contemplated by the court when it decided the limited issues presented in *Ecumenical Ministries*.<sup>(fn5)</sup> We also acknowledge that Article XV, section 4(4)(c), contains a provision that appears to recognize the lawful conduct of parimutuel wagering on racing. However, it would be unrealistic to contend that when parimutuel racing is combined with the introduction of 75 video lottery machines, the result is still just a race track. We believe that the addition of such a significant number of gambling devices, unrelated to racing or parimutuel gambling, likely would lead a court to conclude that those facilities have been converted to casinos, as that term was construed by the court in *Ecumenical Ministries*.

The court, in *Ecumenical Ministries*, refused to isolate video lottery terminal play from the type of games that traditionally are conducted at casinos,

and thereby declined to hold that Lottery-authorized games, as a class, are outside of the casino prohibition. Instead, the court recognized that the conduct of video play, although authorized by the commission, could in a proper case constitute the operation of a casino:

It may be that some establishments in which video lottery games are located are casinos within the meaning of Article XV, [section 4(6)], notwithstanding the limited number of

terminals in each establishment and the requirement that the establishment be licensed to engage in a business other than the business of gambling.

318 Or at 564. The court made this statement notwithstanding that the establishments in question were subject to a statutory limitation of five terminals per establishment. Therefore, we conclude that the combination, in a single establishment, of both parimutuel wagering as a dominant activity and use and 75 video lottery terminals probably will result in the operation of an establishment whose dominant purpose or dominant use, or both, is for gambling, as those terms were used by the court in *Ecumenical Ministries* to define "casino."

The fact that a race course already is devoted to parimutuel wagering, i.e., gambling activity, has a significant influence on our conclusion that the combined operation of parimutuel wagering and 75 video lottery terminals at one race facility constitutes the operation of a casino, forbidden by Article XV, section 4(6). However, regardless of whether an establishment is a race track or another type of business, we regard a concentration of 75 video lottery terminals at any single establishment under one ownership or devoted to a single general function as having a high probability of violating the prohibition against the operation of casinos. Nothing in HB 3411 prohibits the race tracks from operating the video lottery terminals at times when no parimutuel racing activity is being conducted. At such times, the operation of the facilities would be confined to off-track betting, authorized by ORS 462.700 to ORS 462.740, and the conduct of video lottery terminal play.

The consequence of such an operation with 75 video lottery terminals would be to increase the proportion of gaming activity attributable to video lottery in relation to the parimutuel wagering activity. When video lottery terminals are operated in the absence of animal races, therefore, the facilities cease to be used as race tracks, and instead constitute little more than gambling facilities whose dominant use is not for parimutuel racing, but for video lottery game play of a highly concentrated character.

We have been presented with an argument that, because the racetracks are engaged in parimutuel activity that is not constitutionally prohibited,<sup>(fn6)</sup> the parimutuel wagering should not be considered as "gambling" when determining whether the placement of video lottery terminals at the race tracks will result in a "casino" under the constitutional prohibition. To conclude that the dominant use or dominant purpose of the racetracks is not for gambling, we would have to determine that the conduct of parimutuel wagering activity is not "gambling" as that word was used by the court in *Ecumenical Ministries*. There is nothing in Article XV, section 4, of the Oregon Constitution to support the conclusion that parimutuel wagering on animal races is not gambling activity. Clearly, it is. See *Mult. Co. Fair Ass'n v. Langley*, 140 Or at 179. Neither does the constitution contain any suggestion that parimutuel wagering cannot be an element of the gambling activity that, when combined with other forms of gambling at the same place, adds up to the operation of a casino.

Of course, like the video lottery retailers who operate up to five terminals under ORS 461.215, racetracks are licensed to engage in business activity other than gambling. They serve alcoholic beverages and provide food concessions to their patrons. However, the overwhelming

proportion of the activity conducted at a racetrack is gambling activity.(fn7)

In *Ecumenical Ministries*, the court upheld, against a facial challenge, the statutes that permit up to five video lottery terminals at any particular establishment. House Bill 3411 would permit 75 video lottery terminals at each of two race tracks. Taken by itself, this 15-fold increase in the number of

terminals at a particular establishment presents such a significant expansion of the potential gambling activity as to raise questions about the constitutionality of the bill. But, equally significant is the fact that these video lottery terminals would be located at establishments whose primary business already is gambling. Given the court's test for a prohibited casino---an establishment "whose dominant use or dominant purpose, or both is for gambling"---we conclude that the combination of the high level of video lottery gambling activity associated with 75 terminals, along with the existing parimutuel gambling at the racetracks, probably would be regarded by a court as a casino, prohibited by Article XV, section 4(6).

### C. Operation of Fewer than 75 Video Lottery Terminals

As discussed above, HB 3411 permits a race track licensee with a video lottery contract to install up to 75 video lottery machines, subject only to the bill's floor space limitations. Neither the commission nor the director of the Lottery is authorized by HB 3411 to limit any race track licensee that meets the space requirements to any fewer than 75 machines.

We have been presented with an argument, based on cases such as *Cooper v. Eugene Sch.* Dist. No. 4J, 301 Or 358, 362--65, 723 P2d 298 (1986), that in administering HB 3411, the Lottery must apply it in a manner that is consistent with constitutional principles. Thus, if the installation of 75 machines would result in a race track's violating the casino prohibition because its dominant purpose or dominant use would be gambling, the Lottery would have a duty to authorize fewer than 75 machines in order to avoid the creation of a casino. This contention, however, begs the question whether a facial authorization of 75 video lottery terminals at a race track violates the constitution. Section 4(3) of HB 3411 states:

Notwithstanding ORS 461.217, if the director enters into a contract with a race meet licensee described in subsection (1) of this section, the race meet licensee may install, upon 10 percent of the enclosed floor space at the facility used by patrons, a number of video lottery game machines that does not exceed one machine for each 24 square feet of such enclosed floor space, in a total amount not to exceed 75 video lottery game machines per facility.

(Emphasis added.) This bill authorizes what we conclude above likely would be interpreted as a casino.

Article XV, section 4(6), is not phrased as a prohibition on a gambling facility of a certain character, although it has the effect of prohibiting such facilities, but as a direct prohibition on actions taken or not taken by the Legislative Assembly itself: "The Legislative Assembly has no power to authorize, and shall prohibit, casinos \* \* \*." Thus, if the bill, on its face, authorizes a

casino, then the Legislative Assembly has exceeded its authority as circumscribed by Article XV, section 4(6). The peculiar wording of the

prohibition directly limits the Legislative Assembly's authority to adopt certain statutes, regardless of whether a public official or commission subsequently could limit its application to avoid constitutional questions. The mere enactment of HB 3411 appears to contravene the constitutional provision.

## II. Statutory Restrictions on Compensation Paid to Lottery Game Retailers

In previous opinions, we addressed the relationship between the authority of the commission to promulgate rules and to establish and operate a State Lottery, pursuant to Article XV, section 4, of the Oregon Constitution,(fn8) and the authority of the Legislative Assembly to regulate the Lottery. See, e.g., 44 Op Atty Gen 431 (1985), 46 Op Atty Gen 61 (1988). Those conclusions pertinent to the second question asked in this opinion are summarized in our 1988 opinion as follows:

[T]he legislature may not enact statutes that would be contrary to specific provisions of amended Article XV, section 4 [of the Oregon Constitution]. Nor may the legislature eliminate the commission or its authority to implement and operate the state lottery, or transfer the commission's powers to another governmental body. Thus, the constitution precludes the legislature from exercising appropriation authority with reference to the administration of the lottery, and from imposing a greater or lesser expenditure limitation than that set forth in the constitution. However, "[o]ther forms of budget supervision must be analyzed according to the general principle that the Legislative Assembly cannot unduly interfere with the Lottery Commission's constitutional duty to establish and operate a lottery."

46 Op Atty Gen at 67 (citations omitted).

We also recognized that legislation implementing the Lottery, Ballot Measure 5 (1984), was approved by the same voters who approved the constitutional amendment that established the Lottery, and that the implementing legislation was sponsored by the same chief petitioners who supported the constitutional amendment. 44 Op Atty Gen at 439. Therefore, we concluded that the constitutional provisions and the statutory implementing legislation should be construed together:

[G]iven the fact that the chief petitioners of both ballot measures were the same, and that Ballot Measure 5 initiated statutory provisions, we believe, as a general rule, that areas specifically considered in Ballot Measure 5 were intended to be

within the legislature's prerogatives. In other words, the legislature may safely legislate in the areas addressed in Ballot Measure 5 as they concern the operation of the lottery, without concern that such legislation would impinge on any area of exclusive authority given to the commission by the constitution.

44 Op Atty Gen at 439 (emphasis added).

We reaffirmed that conclusion in 46 Op Atty Gen at 63, 67. Subsequently, the court in *Ecumenical Ministries* substantially confirmed the approach of those Attorney General opinions regarding the provisions of Measure 5 as significant indicators of the meaning of the constitutional amendment. The court concluded that Measure 5 "constitutes part of the context" that may be consulted in determining the intent underlying the constitutional provisions that established the Lottery. 318 Or at 562, 566--67.

Accordingly, for guidance concerning the areas in which the legislature may enact laws affecting the operation of the Lottery, we examine Measure 5. With respect to Lottery retail contractor compensation, Measure 5 prescribed a rate of compensation. Section 5(5) of the Measure stated:

Upon recommendation of the Director, the Commission shall determine the compensation to be paid to Lottery Game Retailers for their sales of lottery tickets or shares. Until the Commission shall otherwise determine, the compensation paid to Lottery Game Retailers shall be 5% of the retail price of the tickets or shares plus an incentive bonus of 1% based upon attainment of sales volume or other objectives specified by the Director for each lottery game. In cases of a Lottery Game Retailer whose rental payments for his premises are contractually computed in whole or in part, on the basis of a percentage of his retail sales, and where such computation of his retail sales is not explicitly defined to include sales of tickets or shares in a state-operated lottery, the compensation received by the Lottery Game Retailer from the Lottery shall be deemed to be the amount of the retail sale for the purposes of such contractual computation.

(Emphasis added).(fn9)

This voter-approved legislative provision established a rate of compensation for Lottery retail contractors. Because the 1984 Measure preceded the advent of video lottery, it could not have contemplated video retail contractor commissions. Nevertheless, despite the differences in games, equipment and sales volumes, there is little or no basis for concluding that video retail contractors are so different from the retail contractors for the original games that legislation could not likewise regulate the compensation of video retail contractors.

Therefore, within limits, the area of video retail contractor compensation is an area in which, in the words of our earlier opinion, "the legislature safely

may legislate without concern that such legislation will impinge upon the commission's constitutional exclusive authority." 46 Op Atty Gen at 63. However, the legislature's ability to prescribe rates of compensation, or to impose other restrictions on the commission's authority to establish rates of retail contractor compensation, is not unlimited.(fn10)

The compensation rates established in Measure 5 had two characteristics that suggest that the legislature does not have unrestricted power to prescribe or regulate those rates. First, section

5(5) of Measure 5, quoted above, arguably may be regarded as merely a "start-up" provision; it established an initial compensation schedule, but reserved to the commission the authority to change the compensation after the Lottery commenced operations.

Second, the compensation received by Lottery retail contractors constitutes part of the amount, not to exceed 16 percent of the Lottery's gross revenues, that is reserved by implication by Article XV, section 4(4)(d), of the Oregon Constitution for the Lottery's administrative expenses. See Ecumenical Ministries, 318 Or at 565; 46 Op Atty Gen at 71 (both discussing the Lottery's "costs of administration"). Hence, the amounts received as compensation by Lottery retail contractors reduce the sums that are available, under the 16 percent limitation, to fund other aspects of the Lottery's operations. Therefore, if the legislature should prescribe a rate of retail compensation that is so high as to seriously limit the amounts available to the Lottery to finance other Lottery operations, the imposition of such a rate probably would constitute an unconstitutional enactment because it would "unduly burden" the ability of the commission to operate a Lottery.

For example, in 46 Op Atty Gen 453 (1992), we advised that the legislature could not require each game operated by the Lottery to satisfy,

independently of the other Lottery games, the constitutional requirement that no less than 84 percent of the Lottery's gross revenues be paid out in prizes or transferred for economic development purposes, and no more than 16 percent be spent on the Lottery's administrative expenditures. We concluded that the "84 percent/16 percent" standard must be computed using the total annual revenues of the Lottery because the effect of requiring each Lottery game to satisfy that standard would "impose a different expenditure limitation on the lottery" than that established by the constitution. 46 Op Atty Gen at 457.

A decision by the Legislative Assembly to require the Lottery to spend a certain level of its "administrative expenditure" moneys on Lottery retail contractor compensation would not directly impose an expenditure limitation on the commission different from the 16 percent limit on the Lottery's administrative expenses. Such a statute would not, therefore, be invalid as a direct violation of the terms of the constitution. See 44 Op Atty Gen at 442.(fn11) The Lottery would still be able to spend up to 16 percent for administrative expenses, including the retail contractor compensation. However, if the legislature mandated retail contractors' compensation rates that were too high, this could reduce the amount remaining available for administrative expenses to such an extent as to unduly burden the commission's ability to operate the Lottery.

The issue of imposing an undue burden on the commission's constitutional duty to operate the Lottery, however, may rise to no more than hypothetical status in the context of lowering retail contractor compensation. Reducing Lottery retail contractor compensation would free greater sums for the commission to allocate to other administrative expenses, or to be used for economic development or for schools.

Nevertheless, the Legislative Assembly conceivably could enact a compensation scheme that would be so low as to provide potential and actual retail contractors a substantial disincentive to

participate in the video lottery program or in the introduction of new Lottery games or programs. A statute with such an impact on the commission's ability to administer the Lottery's sales program might impose an undue burden or restraint on the commission's

constitutional duty to operate a State Lottery. In concluding that a statutory requirement that each Lottery game separately satisfy the "84 percent/16 percent" allocation was unconstitutional as an undue burden on the commission's exercise of its constitutional powers, we observed:

To avoid a decrease in sales due to player boredom, and to maximize the net proceeds available for economic development, the commission may reasonably conclude that new games must be continually developed. If the percentage limitation is applied with respect to revenues received from individual games, the lottery would be handicapped in its ability to implement new games. \* \* \* If the constitutional percentage limitation were applied to the revenue of individual games, the lottery would face an increased risk of violating the limitation. This would discourage it from implementing new games, and could result in a decrease in the popularity of lottery games and a corresponding decrease in revenues for economic development.

46 Op Atty Gen at 457--58. Similarly, if a legislatively mandated decrease in video retail contractor compensation fosters large scale contractor defections or dissatisfaction to an extent that cripples the commission's ability to market its existing games or to develop new games or programs, that likewise could constitute an undue burden on the commission's constitutional duty to operate a State Lottery.

The challenge in this analysis is that the impact of any legislative action restricting retail contractor compensation on the commission's ability to exercise its constitutional powers cannot be predicted in advance with any degree of certainty. Therefore, although the legislature may regulate compensation rates or establish a particular compensation system, that power is not without limitations, and extreme changes possibly would impose an unconstitutional practical burden on the commission's duty to "operate a State Lottery." Or Const Art XV, § 4(3). We emphasize, however, that the legislature does have authority to regulate compensation rates of retailers, and only extreme changes that would have serious adverse impact on Lottery operations would raise concerns regarding the constitutionality of such regulation.

THEODORE R. KULONGOSKI

Attorney General

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Footnotes:

1 We believe it would require more than threats or predictions of large scale retailer defections due to a decrease in compensation levels to render legislation reducing compensation unconstitutional. Legislation is presumed to be constitutional. See, e.g., *Wright v. Blue Mt.*

Hospital Dist., 214 Or 141, 144, 328 P2d 314 (1958). It does not necessarily follow that the certain result of even significant reductions in retailer compensation is a significant decline in Lottery revenue. We believe that a court would require a showing that a change in retailer compensation in fact had resulted in substantial reductions in lottery sales before it would consider declaring a statute regulating compensation levels unconstitutional.

2 ORS 461.217(3) limits the number of video lottery terminals that may be installed at a retailer's establishment to no more than five terminals. The Oregon Supreme Court upheld ORS 461.217 against a challenge that, on its face, it violated the casino prohibition of the Oregon Constitution in *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 562--64, 871 P2d 106 (1994).

3 An earlier version of the bill contained the same 24 square foot limitation for each terminal, but capped the number of video lottery terminals at each racing facility at 300 terminals. See House Bill 3411 (B-Engrossed). Therefore, we deduce that each racing facility has, or can be modified to have, sufficient square feet of enclosed floor space that the 24 square foot limitation would not prevent installation of the maximum 75 terminals at each facility.

4 We emphasize the probable understanding and intent of the voters who approved Article XV, section 4(6), as did the court in *Ecumenical Ministries*, 318 Or at 559, 562, because:

A constitution is dependent upon ratification by the people. Its language should, therefore, be considered in the sense most obvious to the common understanding of the people at the time of its adoption.

*Jones v. Hoss*, 132 Or 175, 178, 285 P 205 (1930).

5 *Ecumenical Ministries* was decided in the abstract, as a facial challenge to the constitutionality of the two statutes that triggered the video lottery program and restricted to five the number of video lottery terminals that could be operated in an establishment. More importantly, the court explicitly disavowed any attempt to apply the casino prohibition to the concrete circumstances of a particular video lottery retailer. The court stated:

It may be that some establishments in which video lottery game terminals are located are casinos within the meaning of [the constitutional prohibition], notwithstanding the limited number of terminals in each establishment and the requirement that the establishment be licensed to engage in a business other than the business of gambling. That kind of factual, as-applied inquiry is beyond the scope of our inquiry in this case, however. In response to this facial challenge, our task is only to determine whether ORS 461.215 and 461.217, on their face, are in harmony with Article XV, section 4(7).

318 Or at 564 (emphasis added).

At the time *Ecumenical Ministries* was decided, the casino prohibition was found in Article XV, section 4(7). Subsequently, at the May 16, 1995, election, the voters approved Measure 21,

which amended Article XV, section of the Oregon Constitution to renumber the casino prohibition as section 4(6).

6 Article XV, section 4(4)(c), of the Oregon Constitution states that the Oregon State Lottery shall not conduct certain gambling activities:

The State Lottery may operate any game procedure authorized by the Commission, except parimutuel racing, Social games, and the game commonly known in Oregon as bingo or lotto \* \*

This constitutional prohibition against the State Lottery conducting parimutuel racing does not state that parimutuel wagering is not gambling. At most, it prohibits the State Lottery from conducting parimutuel racing, and thereby prevents the State Lottery from directly competing with licensed parimutuel facilities.

7 According to materials provided to us on April 20, 1995, by Hardy Myers, legal counsel for the Multnomah Greyhound Park, the Park's total gross revenue from all sources (parimutuel racing, food and beverage sales and other sources) other than video lottery games is approximately \$11,906,000 per year, of which \$7,934,000 is derived from parimutuel racing (after payment of 3 percent of gross wagering to the Oregon Racing Commission under ORS 462.067(2)). The annual gross revenue figure for the New Portland Meadows facility is \$14,651,000, of which \$12,172,000 is from parimutuel racing (after payment of 3 percent of gross wagering to the Oregon Racing Commission under ORS 462.062(2)). These figures do not include the amount of the winnings paid to persons who bet on the races.

8 Article XV, section 4(3), of the Oregon Constitution states in part:

There is hereby created the State Lottery Commission which shall establish and operate a State Lottery.

Article XV, section 4(4)(a), confers rulemaking power on the State Lottery Commission, stating:

The Commission is empowered to promulgate rules related to the procedures of the Commission and the operation of the State Lottery.

9 The 1985 legislature made minor housekeeping amendments to section 5(5) of Measure 5. See Or Laws 1985, ch 302, § 5. The statute is now codified as ORS 461.310.

10 ORS 361.445, which currently governs the commission's regulation of retail contractors' compensation, states:

In establishing its schedule of payments to contractors, the Oregon State Lottery Commission shall undertake to develop a system that maximizes the net revenue to the state for the public purpose consistent with providing a reasonable rate of return for contractors.

This statute imposes legislative restrictions on the authority of the commission to establish retail contractor compensation levels. The requirement that the compensation maximize the return to the state for economic development purposes is consistent with that part of Article XV, section 4(4)(d), that commands that the Lottery operate as a self-supporting revenue-raising agency of the state. Moreover, the directive to the Commission is phrased in "delegative" terms that permit the Commission significant latitude in establishing an optimum compensation system by rulemaking. See *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228--30, 621 P2d 547 (1980). Therefore, ORS 361.445 does not represent a significant legislatively imposed burden or restriction on the commission's constitutional authority to operate a State Lottery.

11 In 44 Op Atty Gen at 442, we stated:

Any legislative attempt to impose a greater or lesser expenditure limitation on the administration of the lottery would be inconsistent with the 16 percent limitation imposed by the constitution itself. The framers of Ballot Measure 4 clearly specified that the Lottery Commission can spend as much as, but no more than, 16 percent of annual lottery revenues on administrative expenses. Thus, any attempt to impose a different expenditure limitation legislatively would be unconstitutional.